Englewood Hospital *and* Hospital Professionals and Allied Employees of New Jersey, AFT/AFL–CIO, Petitioner. Cases 22–RC–10655 and 22–RC–10665

August 25, 1995

DECISION AND CERTIFICATION OF RESULTS OF ELECTION

BY MEMBERS STEPHENS, BROWNING, AND TRUESDALE

The National Labor Relations Board, by a three-member panel, has considered objections[1] to elections held in three separate units on December 17 and 19, 1992,[2] and the hearing officer's report recommending disposition of them. The elections were conducted pursuant to a Decision and Direction of Election. The revised tally of ballots in the unit of nonprofessional employees was 286 for and 301 against the Petitioner, with 10 challenged ballots, an insufficient number to affect the results. The tally of ballots in the unit of technical employees was 43 for and 86 against the Petitioner, with 12 challenged ballots, an insufficient number to affect the results.

The Board has reviewed the record in light of the exceptions and briefs[3] and adopts the hearing officer's findings and recommendations only to the extent consistent with this decision.

The Petitioner contends in Objection 9 that the Employer interfered with the election by creating literature or leaflets which contained negative and threatening racial or ethnic references, including the reproduction of a Nazi swastika, and by discussing that literature in captive audience meetings with employees and asserting that the literature had been produced by the Petitioner and sent to the Employer's management officials. Although the hearing officer did not find that the Employer's management officials either created the document at issue or attributed its creation to the Union, he, nevertheless, found merit in the Petitioner's Objection 9 and recommended that the election be set aside. We disagree.

According to the credited testimony, Daniel Kane, the Employer's president and chief executive officer, held several meetings with employees during the critical period. Kane discussed his view of the drawbacks and potential liabilities if the employees selected the Petitioner as their bargaining representative. After discussing the subjects of collective bargaining, strikes, and arbitration, Kane mentioned that employees had complained to him about harassment by other employees during the campaign. Kane stated that he also had been harassed, and he held up a letter and said, ''[T]his is what I've received and I'm angry over it.'' Kane then circulated among the employees an anonymous letter that he said he had received. The letter reads:

> You will get it sooner or later. Its [sic] only a matter of time you Jew mother fucker. We know where you live. Tenafly. Tenafly.

(Kane apparently resides in Tenafly, New Jersey.) The letter also contained a reproduction of a swastika and a photograph of David Duke.

Kane told the employees that he was not saying, nor was there any proof, that the Petitioner was responsible for the letter. Instead, Kane said that the ''environment that created animosity between employees was what might generate'' such a letter.

The hearing officer found that Kane's presentation of the letter during the critical period in the context of antiunion meetings was an attempt to inflame and incite religious or racial tensions during the campaign. The hearing officer concluded that the introduction of the document during Kane's campaign speeches required more than the weak disclaimer expressed by Kane, i.e., ''I am not saying that this letter was sent by the Union.'' The hearing officer reasoned that the employees were, at the least, provoked to contemplate the Petitioner's responsibility for and involvement in the preparation and mailing of the letter. He further found that Kane's presentation of the letter could not be characterized as merely casual remarks, but was a deliberate attempt by the Employer in numerous formal campaign meetings to overstress and exacerbate racial and/or religious feelings by irrelevant, inflammatory appeals during the critical period. Applying the Board's policy set forth in *Sewell Mfg. Co.*, 138 NLRB 66 (1962), the hearing officer found that Kane's conduct interfered with the employees' free choice in the election, and he recommended that the election should be set aside on the basis of Objection 9.

In *Sewell*, supra, the Board held that it would set an election aside when a party embarks on a campaign which seeks to overstress and exacerbate racial feelings by irrelevant, inflammatory appeals to racial prejudice. The Board, however, also made clear that not every racial reference made during an election campaign is ob-

[1] By unpublished decision dated September 30, 1993, the Board adopted the Acting Regional Director's decision remanding for further hearing Objections 3, 6, 9, and additional objectionable conduct discovered in the Acting Regional Director's investigation, and overruling Objections 7, 10, and 11. The Petitioner withdrew Objections 1, 2, 4, 5, 8, and 12.

Prior to the close of the hearing, the Petitioner withdrew Objection 6 and the objection concerning additional objectionable conduct. In the absence of exceptions, we adopt, pro forma, the hearing officer's recommendation to overrule Objection 3.

[2] The election in the third unit was conducted in Case 22–RC–10656, and it is not involved herein.

[3] The Employer has requested oral argument. We deny this request because the record and the briefs adequately present the issues and the parties' positions.

jectionable. The Board in *Sewell* distinguished objectionable conduct from isolated, casual, prejudicial remarks, and emphasized that it did not intend to condemn relevant campaign statements merely because they have racial overtones.

Thus, in applying *Sewell*, the question to be answered is whether the statements at issue appeal to racial or religious prejudice against a particular group and are inflamatory and irrelevant. Applying that standard here, we cannot agree with the hearing officer's finding that Kane's conduct was objectionable. Simply put, we find that Kane's remarks ''[did] not deliberately seek to overstress and exacerbate racial feelings by irrelevant, inflammatory appeals.'' Id. at 71–72.

Numerous decisions since *Sewell* support our decision here. In these cases the Board has consistently reiterated that ''the rule in *Sewell* is applicable only in those circumstances where it is determined that the 'appeals or arguments can have no purpose except to inflame the racial feelings of voters in the election.'''[4] The Board has also emphasized that the rule of *Sewell* ''concerns prejudiced campaign propaganda issued by a party to the election, not expressions of employee bias independent of the party's own actions.''[5] As the Board explained in *Baltimore Luggage Co.*, 162 NLRB 1230 (1967):

> Consequently, in *Sewell*, we did not lay down the rule that parties would be forbidden to discuss race in representation elections. Rather, we set aside an election because the campaign arguments were inflammatory in character, setting race against race—an appeal to animosity rather than to consideration of economic and social conditions and circumstances and of possible actions to deal with them. [162 NLRB at 1233.]

In our view, Kane's conduct here did not rise to the level of a sustained appeal to racial prejudice of the type condemned in *Sewell* and its progeny.[6] Kane's remarks did not appeal to feelings of racial and religious bias, nor did they seek to pit race against race. Rather, they denounced such feelings. Although Kane repeated his discussion of the letter in several meetings, it certainly was not a centerpiece of the Employer's campaign. Thus, unlike in *Sewell*, the record does not show that race was a significant aspect of the campaign in this case. In addition, as noted above, there is no evidence that the Employer created the letter in question, and Kane did not attribute it to the Petitioner.

We find the Board's decision in *Beatrice Grocery Products*, 287 NLRB 302 (1987), to be particularly instructive and applicable here. In *Beatrice*, the Board found that a union representative's statement involving an alleged racial appeal to employees did not warrant setting the election aside. In so finding, the Board stated that ''[b]ecause the statement represented an effort to denounce racial prejudice in another (the Employer), rather than to incite prejudice against a particular racial or religious group. . . it does not constitute the kind of gratuitous appeal to racial prejudice that *Sewell* brands as objectionable conduct.'' 287 NLRB at 303.[7] Similarly, Kane's remarks did not attack a particular racial, ethnic, or religious group, nor did they constitute a bigoted attack on any individual. In these circumstances, we fail to discern how Kane's comments could have reasonably tended to interfere with the election by destroying the atmosphere necessary to the exercise of free choice.[8] Accordingly, we certify the results of the election.

CERTIFICATION OF RESULTS OF ELECTION

IT IS CERTIFIED that a majority of the valid ballots have not been cast for Hospital Professionals and Allied Employees of New Jersey, AFT/AFL–CIO and that it is not the exclusive representative of the employees in the bargaining units.

MEMBER BROWNING, dissenting.

Contrary to my colleagues, I would adopt the hearing officer's recommendation, and set the election aside because the Employer improperly injected racial prejudice into the campaign.

During preelection meetings with employees, the Employer's president and chief executive officer, Daniel Kane, expressed his anger about an anonymous ''hate'' letter that he said he had received. This letter, which Kane circulated among the employees, called Kane a ''Jew mother fucker'' and threatened that he would ''get it sooner or later'' and that the letter's authors ''know where you live.'' The letter also contained a reproduction of a swastika and a photograph of David Duke. Kane told the employees that he was not claiming that the Petitioner was responsible for the letter, but rather that the ''environment that created animosity between employees was what might generate'' such a letter.

[4] *Bancroft Mfg. Co.*, 210 NLRB 1007, 1008 (1974) (quoting from *Sewell*).

[5] *Benjamin Coal Co.*, 294 NLRB 572, 573 (1989).

[6] See *Coca-Cola Bottling Co.*, 232 NLRB 717 (1977). Compare *YKK (U.S.A.), Inc.*, 269 NLRB 82 (1984).

[7] See also *Catherine's Inc.*, 316 NLRB 186 (1995); *Brightview Care Center*, 292 NLRB 352 (1989).

[8] Our dissenting colleague agrees with us that Kane did not endorse or appeal to racial prejudice. Under *Sewell*, that should be the end of the inquiry. Instead, our dissenting colleague would find the *Sewell* violation on the ground that Kane's denunciation of the hateful ethnic material was a ''thinly veiled attempt'' to equate the Union's solicitation of employees with harrassment. In our view, the facts here do not warrant such an inference. Further, our dissenting colleague's view that Kane's reference to an ''environment that created animosity'' impermissibly injected racial matters into the campaign within the meaning of *Sewell*, has no basis in Board or court precedent.

In my view, Kane engaged in objectionable conduct under *Sewell Mfg. Co.*, 138 NLRB 66 (1962), by expressly linking the hateful anti-Semitic comments in the letter he circulated to the Petitioner's election campaign. In citing to an ''environment that created animosity between employees,'' Kane clearly was referring to the atmosphere that had resulted from the employees' organizational efforts and the Petitioner's presence at the Employer's facility. Thus, employee Melvina Harris credibly testified that Kane advised the employees that ''these are the type of threats and things you get when you're in like, you know, trying to fight for a union or whatever.'' Kane thus effectively claimed that the mere fact that some employees wanted a union created an atmosphere that could incite racial prejudice in the ugly manner that was manifested in the letter he circulated among the employees.

In *Sewell*, the Board held that a party's injection into a campaign of *irrelevant*, inflammatory racial matters will constitute objectionable conduct. The Board stated:

> What we have said indicates our belief that appeals to racial prejudice on matters unrelated to the election issues or to the union's activities are not mere ''prattle'' or puffing. They have no place in Board electoral campaigns. They inject an element which is destructive of the very purpose of an election. They create conditions which make impossible a sober, informed exercise of the franchise. The Board does not intend to tolerate as ''electoral propaganda'' appeals or arguments which can have no purpose except to inflame the racial feelings of voters in the election. [138 NLRB at 71.]

Although strictly speaking, Kane was not himself endorsing or appealing to racial prejudice, he did raise the spectre of racial and ethnic hatred as an element of the election campaign. Further, Kane's presentation of the letter to the assembled employees and his comments about it were not germane to any legitimate issue involved in the election. Kane's distribution of the letter was made in the context of his comments about alleged harassment of employees. Kane's denunciation of ''harassment,'' however, was a thinly veiled attempt to equate legitimate solicitation of employees during the Petitioner's campaign with ''harassment.'' By linking such solicitation and the ''environment'' created by the organizational campaign to the hateful ethnic material he was quoting from, Kane sought to discredit the Petitioner and its campaign in a manner which impermissibly injected racial and religious prejudice into the campaign.

In *YKK (U.S.A.), Inc.*, 269 NLRB 82 (1984), the Board found objectionable under *Sewell* a union's inflammatory and prejudicial references to the employer's Japanese ownership and management. Just as the Board in *YKK*, supra, found that there was ''no conceivable way that a reference to beating 'Japs' at Pearl Harbor could be relevant to a legitimate campaign issue,''[1] I find that Kane's remarks linking the hate letter he had received to the Petitioner's campaign was unrelated to any legitimate issue facing the employees during the campaign.

Nor may Kane's conduct properly be dismissed as isolated or insignificant. As the hearing officer noted, Kane, the president of the Employer, disseminated the letter to large groups of employees at a number of meetings called to communicate Kane's antiunion views. I agree with the hearing officer that, at a minimum, Kane suggested to the employees that the Petitioner was involved in the preparation and mailing of the letter. The Board has held that a statement to the effect that the other party in the election would engage in racial discrimination ''may well be grounds for setting an election aside'' under *Sewell.*[2] I conclude that this is just such a case, because the Employer has suggested that the Union, or at least the ''atmosphere'' created when the employees exercised their right to organize and choose union representation, created and spread scurrilous racial and religious threats and appeals.

Accordingly, in the circumstances here, I find that Kane's circulation of the letter and his accompanying remarks made a fair election impossible, and I would direct a new election.

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[1] 269 NLRB at 84.

[2] *Glazers Wholesale Drug Co.*, 209 NLRB 1152 (1974).